

MINUTES OF THE MEETING OF
THE BAR-BENCH-MEDIA CONFERENCE

A meeting of the Bar-Bench-Media Conference was held on Thursday, October 17, 1996 in the Supreme Court Conference Room in Wilmington. The meeting was open to the public. Notice of the meeting had been posted. The members of the Conference in attendance were:

Members from the Print News Media

Rita Farrell
John Sweeney

Members from the Bench

Vice Chancellor Jack B. Jacobs
Thomas W. Nagle
Judge Roderick R. McKelvie
President Judge Henry duPont Ridgely

Members from the Bar

Eugene H. Bayard, Esquire
Richard D. Kirk, Esquire
Howard Handleman, Esquire

Judge McKelvie called the meeting to order.

Approval of the Minutes: The minutes of the previous meeting were approved.

Report of the Internet Committee: Judge McKelvie and Richard Kirk proposed the date of April 10, 1997 for a proposed upcoming full-day conference. The committee will explore locales in Wilmington.

Report on Media Coverage in the Trial Courts: Judge McKelvie reported that Justice Holland had told him there were no developments to report on the Supreme Court's

consideration of our report on expanding media coverage in the trial courts. At the moment a significant issue is whether the Justices will conclude we will need to design and equip a special courtroom or courtrooms to accommodate electronic equipment. The Justices are considering that and the potential expense.

Discussion topic: Our guest speaker Richard Elliott distributed the attached summary and lead a discussion on the subject of privacy and access to court papers and proceedings.

Discussion Topic for December 19th Meeting: Our next meeting will be at 1:00 P.M. on Thursday, December 19, 1996 in the Delaware Supreme Court conference room in the Carvel Building in Wilmington. Our discussion topic for the December 19th meeting will be the presumption of confidentiality in Family Court proceedings.

New Business: Rita Farrell proposed as a discussion topic for an upcoming meeting the subject of libel.

Respectfully submitted,

Peter Dalleo

SUMMARY -- PRIVACY

- I. Who you are.
 - ☐ private individual versus public figure
- II. Position in the litigation
 - ☐ party, witness, no involvement
 - ☐ ability to defend accusation
- III. Nature of the subject matter
 - ☐ private versus public dispute
- IV. Prior publicity about the subject matter
- V. Stage of the proceeding
 - ☐ pretrial or trial

PRIVACY AND COURT ACCESS CASES

Defendants -- Criminal Cases

- 1. Privacy Rights of defendants do not justify closure of a proceeding. Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318, 324-27, cert. denied, 449 U.S. 992 (1980); United States v. Martin, 15 Media L. Rep. 1403 (D. Mass. 1988).
- 2. Exception where defendant's privacy rights justify closure is where the evidence results from a wire tap. 18 U.S.C. §§ 2510-2520. Providence Journal Co. v. F.B.I., 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

Civil Cases

- 1. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).
- 2. Generalized allegations of injury to reputation (privacy) insufficient. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 484 (3d Cir. 1995).

3. Privacy interests may exist in a civil case. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786-787 (3d Cir. 1994) (privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny).

Third Parties

1. There needs to be specific evidence in the record before the court can take action. Waller v. Georgia, 467 U.S. 39, 48 (1984) (“The State’s proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes.”)
2. Mere embarrassment, unflattering or false references are insufficient. United States v. Criden, 681 F.2d 919 (3d Cir. 1982) (Criden I) (blanket exclusion of all references to third parties, firms or corporations not named as defendants in any related prosecutions constitutes reversible error; only those references “rising to the level of intensified pain, as distinguished from mere embarrassment,” warrant exclusion).
3. However, under certain circumstances, privacy or reputational interests may outweigh the public’s common law right of access. United States v. Criden, 648 F.2d 814 (3d Cir. 1981) (Criden III).
4. Concern as to the ability of third parties to exonerate themselves. United States v. Smith, 776 F.2d 1104, 1113-14 (3d Cir. 1985) (Smith I).

Examples

1. Protection of minor victims of sex crimes from further trauma and embarrassment may be compelling interest. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (will vary with circumstances of each case).
2. Prospective jurors being questioned during voir dire. Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984) (under some limited circumstances).
3. Unindicted co-conspirators. Smith I, 776 F.2d at 1114 (“no exaggeration to suggest that publication . . . might be career ending for same”).
4. Politicians. United States v. Smith, 787 F.2d 111 (3d Cir. 1986) (Smith II) (witness was high ranking state political figure; slight risk of embarrassment; side bar transcript unsealed).

5. Issue is in the public domain. Smith II, 787 F.2d at 116; In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89-93 (3d Cir. 1990); United States v. Gonzalez, 927 F. Supp. 768 (D. Del. 1996) (witness privacy interests diminished because allegation in sealed documents already widely reported).
6. Reputation of those attacking the witness. United States v. Gonzalez (third party allegations questioning witness not subject to privacy protection because of widespread publicity).
7. Persons named in search warrant affidavit. In re Macon Telegraph Publishing Co., 900 F. Supp. 489, 492 (M.D. Ga. 1995) ("A search warrant is not a charge of criminal misconduct. Often times, innocent individuals are necessarily, but unfortunately, the target of search warrants."). In re Search of 1993 Jeep Grand Cherokee, Case No. 96-91M, Trostle, U.S. Magistrate Rept. and Recommendation (D. Del. Oct. 11, 1996).
8. Copies of audio tapes played to the jury. United States v. Martin, 746 F.2d 964 (3d Cir. 1984).
9. Attorney-client confidences. Isaacson v. Keck, Mahin & Cate, 1992 U.S. Dist. LEXIS 15539 (N.D. Ill. Oct. 8, 1992) (seal attorney confidences, but not the entire sex harassment trial).

Alternatives

1. Redaction. United States v. Martin, *supra*.
2. Closure. Should only be done if no other alternatives.